

ELD IN BELGIUM

Country Report - Framework Contract No. ENV D.4/FRA/2016/0003

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I. Evaluation, social appreciation of ELD

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In the legal profession the Belgian legislation implementing the ELD should be well known, as most environmental law handbooks are dealing with the issue. We can e.g., apart from the specialist literature¹, refer to the *Milieuzakboekje*² and the *Handboek Milieurecht*³. The impression exists however that the knowledge is very basic and that most (environmental) lawyers do not master the technical details about e.g. what is considered to be environmental damage under the ELD or what type of preventive and remedial measures are covered by it. The same applies to ENGOs. The judiciary does not seem to be well aware of the legislation, that is considered to be primarily legislation to be administered by administrative authorities.

Information about the implementing legislation for a broader public is available on the various websites of the regional authorities: the Flemish Region⁴, the Walloon Region⁵ and the Brussels Capital Region⁶. Information is also available on different websites of insurance companies or brokers⁷.

¹ H. BOCKEN & R. SLABBINCK (eds.), *Omzetting en uitvoering van de richtlijn milieuschade*, Gandaius Ontmoetingen met recht, Wolters Kluwer Belgium, Mechelen, 2008, 214 p; C.-H. BORN & M. DELNOY, "Le décret wallon du 22 novembre 2007 sur la prévention et la réparation des dommages environnementaux", *Amén.* 2009, 76-93 en 158-182; L. DEMEZ, B. DUBUISSON, B. JADOT, D. JANS, S. LEPRINCE, B. LOMBAERT, D. MISONNE, P. MOËRYNCK, G. PIJCKE, C. THIEBAUT, F. TULKEN, *La responsabilité environnementale*, Limal, Anthemis, 2009, 324 p; R. SLABBINCK, "De Europese Richtlijn Milieuschade werkt (niet): waarom en wat nu ?", *TOO* 2018, 166-169; N. DE SADELEER, *Droit des déchets de l'UE. De l'élimination à l'économie circulaire*, Bruylant, Bruxelles, 2016, 273-276.

² E. DE PUE, L. LAVRYSEN & P. STRYCKERS, *Milieuzakboekje 2020*, Mechelen, Wolters Kluwer, 135 – 155, 593-595, 599-600; 944-946.

³ L. LAVRYSEN, *Handboek Milieurecht*, Mechelen, Wolters Kluwer, 2016, 463-479.

⁴ <https://omgeving.vlaanderen.be/milieuschade>

⁵ <https://www.wallonie.be/fr/demarches/demander-laction-des-autorites-publiques-en-cas-de-dommage-environnemental>

⁶ https://document.environnement.brussels/opac_css/elecfile/Hoofdstuk_Algemeen_NL.pdf

⁷ <https://www.marsh.com/be/nl/services/environmental-risk.html>; https://www.vanbreda.be/vrb-custom/uploads/2015/07/infofiche_milieu.pdf

Although the awareness of the public at large for cases of environmental damage is growing, the (ELD) legislation is too complex to be known by the public.

Larger companies are believed to be well aware of the legislation, through their environmental officers and trade-organizations. That is however in general not the case for smaller enterprises and operators. The impression exists that the ELD has contributed to the development of insurance policies that cover different forms of environmental damage, but not necessarily limited to environmental damage in the sense of the ELD, e.g. for damage due to asbestos removal operations⁸. We can refer in this respect to the Flemish Construction Confederation that has developed together with the environmental division of insurance consultant and broker Marsh Environmental Practice a collective environmental liability insurance for their members, which covers, among other things, damage to biodiversity and damage caused by asbestos spreading.⁹

Practitioners rarely refer to the ELD legislation. In cases of soil pollution, practitioners exclusively refer and apply the different regional soil clean up legislations, without any reference to the ELD or its transposing legislation, because the threshold for intervention on the basis of the soil legislation is much lower¹⁰ and this legislation is better known, less complex and delivering results that are believed to be in line with the ELD objectives. The soil sanitation legislation (the first Decree in the Flemish Region dates back to 22 February 1995, the Brussels Capital Region followed with an initial Ordinance on 13 May 2004 and the Walloon Region followed with a first Decree on 5 December 2008) has contributed to high societal attention on prevention and clean-up of soil pollution, a legislation that is well known and taken seriously by all concerned actors (real estate owners, notaries, real estate agencies and citizens at large¹¹). There is a relatively high awareness of the impact of soil damage on the property value and the environmental value of pieces of land. The ELD and its transposition legislation are far less known. Even soil sanitation professionals are as a rule not asking themselves whether the soil sanitation case at hand could fall under ELD. It is however believed that recent cases of soil pollution (on average 170 yearly in the Flemish Region) are well treated through the so-called accelerated procedure for remediation of accidental cases. Those cases must be reported within 30 days to the competent authority and effective remediation may not take longer than 180 days. The situation in the two other regions is similar.

⁸ V. FOGLEMAN & K. DE SMEDT, *Belgium. Improving financial security in the context of the Environmental Liability Directive*, May 2020 Final, 32 p.

⁹ <http://www.vcb.be/press-room-detail?id=1419>

¹⁰ In the Flemish Region recent cases (cases that occurred after 28 October 1995) of soil pollution must be cleaned up if the soil sanitation standards are exceeded. Those detailed standards have been laid down by the Flemish Government (<https://navigators.emis.vito.be/mijn-navigators?wold=23754>) and are meant to reflect “a level of soil contamination that presents a *significant risk of negative effects on man or the environment*”. In the Brussels Capital Region the “intervention standards”, laid down by the Government, are applicable (https://leefmilieu.brussels/sites/default/files/legi_20180329_arrete_normes_1.pdf). They have been set at a level corresponding with “concentrations of pollutants in soil and groundwater, determined per vulnerability zone, above which *the risks to public health and / or the environment are considered not to be negligible* and treatment of the pollution is required. In the Walloon Region there are “threshold values” corresponding to “a concentration of pollutants present in the soil corresponding to a level *above which (...) remediation is undertaken in the event of new pollution*”, meaning a soil pollution caused by an emission, event or incident occurring after April 30, 2007 (<http://environnement.wallonie.be/legis/solsoussol/sol006annexe1.pdf>).

¹¹ The OVAM is e.g. delivering around 1000 soil certificates per day, informing if the piece of land at stake is registered in the land information register, collecting information on soil pollution. In case a piece of land is registered in the land information register, a soil certificate, containing the relevant information on the quality or pollution of the soil, is delivered to the landowner, user and municipality.

Experience teaches that water damage in the sense of the ELD is very difficult to prove because of the notion of water damage *an sich*, the different thresholds provided for and the data that are necessary to prove this type of damage¹². Even in the *Aquiris-Zenne* (2009-2010) pollution case¹³ no water damage could be proved. The penal prosecution of the operator has been dropped and the different civil cases for claiming damage¹⁴ are still pending.

II. ELD numbers in the country

The number of cases of environmental damages in Belgium formally treated as ELD cases¹⁵, is very low¹⁶.

The various bi-annual reports to the Flemish Government on the implementation of the Flemish ELD implementation legislation mention e.g. that in the period 2008-2009, 2010-2011, 2016-2017 and 2018-2019 there were no such cases. The 2012-2013 and the 2014-2015 reports each mention one case, respectively the disaster with a *cargo train* transporting dangerous goods that derailed in *Wetteren* on 3 May 2013, in which administrative containment measures to limit *soil damage* and remediation measures have been imposed by the Flemish Public Waste Company (“OVAM”), and a case of *severe surface water pollution* on the *Bossuit-Kortrijk channel* (River Scheldt-Lys junction) on 24 September 2012 close to the regional border with Wallonia, resulting in massive fish mortality¹⁷.

In the *Wetteren cargo train* incident the railway infrastructure company *Infrabel* took remedial measures valued at € 4.112.000. The OVAM provided an end-evaluation of the soil sanitation after 2 years of sanitation activity, according the Soil Sanitation and Protection Decree of 27 October 2006. *Infrabel* will recover the cost of the train operator. Currently, the claim for damages is subject to a judicial expert investigation in which all damage items are analysed by a panel of experts with a view to recovering them from the liable party at a subsequent procedural stage.

¹² P. DESMEDT, T. MALFAIT, R. SLABBINCK, H. DESMET & A. VERLIEFDE, Eindrapport “Juridisch advies inzake het Milieuschadedecreet en schadegevallen in oppervlaktewateren”, Vlaamse Milieumaatschappij Afdeling Rapportering Water, 2010, 217 p.

¹³ <https://www.epsu.org/article/veolia-water-company-aquiris-pollutes-belgian-river-zenne>
https://www.standaard.be/cnt/dmf20100106_099;
<https://www.vrt.be/vrtnws/nl/2010/11/23/aquiris-mocht-waterzuivering-niet-stoppen-1-911399/>;
<https://www.tijd.be/ondernemen/milieu-energie/aquiris-had-geen-reden-om-waterzuivering-te-onderbreken/8990515.html>

See also: https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/BE%20-%20Bruxelles.%20Rapport%202004-35-CE.pdf, p. 2-4.

¹⁴ REKENHOF, *Waterzuiveringsstation Brussel-Noord. Exploitatie van de concessie van 2009 tot 2013*, Verslag van het Rekenhof aan het Brussels Hoofdstedelijk Parlement, Brussel, October 2013, p. 62-63

¹⁵ Meaning that the legislation transposing the ELD is applied.

¹⁶ The Milieu Consulting Report “*Implementation of the Environmental Liability Directive Belgium – Country fiche 2019*” (June 2019) mentions for the period 2007-2017 1 ELD case and 8 cases of environmental damage reported by media, but not considered to be ELD cases by the authorities.

¹⁷ In the Belgium-Country fiche 2019 this case is recorded as “Death of fish in the Upper Scheldt on 24 September 2012”. See also the cases mentioned in the Report of the Federal State concerning the marine environment and civil protection: https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/BE%20-%20Federal%20government%20report.pdf

The *Bossuit-Kortrijk channel case* has been considered by the VMM (Flanders Environment Agency) to be damage to water according to the ELD and the Flemish transposing legislation¹⁸. The source of the pollution was believed to be situated in Wallonia. The transboundary WASS (*alert*) procedure of the River Scheldt Treaty had been activated, but no source of pollution could be identified with certainty by the Walloon Environmental Inspectorate. Monitoring of the environmental damage to water and biodiversity has been carried out by the VMM and ANB (*Agentschap voor Natuur en Bos* – Flanders Agency for Nature and Forest) respectively. No remedial actions have been taken as natural recovery was believed to be the best approach. Further inquiries by the competent Walloon and federal judicial authorities could not determine the responsible company. The environmental damage and the costs of the measures taken by various authorities, have not been quantified.

Two more recent cases should be mentioned. The first one occurred on the 17th of September 2014 in *Witry* (commune of *Léglise*) in the Walloon Region, close to the border of the Grand Duchy of Luxembourg. A tractor and sprayer filled with a pesticide were involved in a road accident and the content of the sprayer was discharged in the surrounding prairies and in the drains of the roadway, polluting further on a rivulet, tributary of the river *Sûre*. The pollution has been detected later on at the *Esch-sur-Sûre* barrage in the Grand Duchy of Luxembourg and the groundwater below the meadows and road has been polluted for a longer time. Different reports of violation by specialised regional environmental services have been drawn up and sent to the competent public prosecutor's office, who decided not to prosecute the case. The administrative sanctioning track has been subsequently activated, resulting in an administrative sanction of 5.000 EUR, with a total stay during 3 years, reserving the remediation measures for another decision. Because environmental damage occurred in two Natura 2000 areas, with significant negative impacts for the *Sûre* pearl mussels and tick mussels (75 % destroyed), restoration measures have been imposed by decision of the Director General of the *Service Public de Wallonie Agriculture, Ressources naturelles et Environnement* ("SPW") of 11 June 2019. The decision, the result of a process started in 2015, includes primary, complementary and compensatory restoration measures. The primary restoration measures, to be implemented by the operator at his own expense, include polluted earth excavation, installation of a water collection and filtration device, measurement and monitoring campaigns. The growing of *Sûre* pearl mussels and tick mussels has been delegated to a subcontractor of the SPW. Every year those mussels are introduced again in the River. The cost of € 198.722,77 is to be paid by the operator, as well as the reintroduction costs of € 49.164,98. The complementary restoration measure consists of the creation of a new forest ford that will avoid the introduction of fine particles in the vulnerable stream (estimated at € 20.000). The compensatory restoration measure consists of the plantation of 500 meter of river cords of 5 meter width during 15 years (estimated at € 16.250). A financial warranty of € 281.138 has been imposed. As the operator was covered by an insurance and the insurance company was co-operating actively with the authority, all measures could and can be executed in time.

The second one is a case of transboundary water pollution on the River Scheldt started on 9 April 2020 and causing massive death of fish (millions over a distance of more than 50 km in France and the Walloon Region of Belgium), caused by the collapse of a dam of the *Sucrerie Tereos d'Escaudoevres*, near *Cambrai* in the North of France, discharging more than 100.000 m³ of waste water charged with beet pulp in the River Scheldt. The French authorities have not alerted the Belgian ones of that incident. On 19 April 2020 the automatic measurement station at the border between the Walloon Region and France reported the abnormal situation, that was soon followed by dead fish popping up. The preventive measures taken by the Walloon authorities – the installation on 20 April 2020 of 4

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https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/BE%20-%20Flemish%20report.rev.%20-%20EN.pdf, p. 3-5.

pumps to inject oxygen close to the border with the Flemish Region - proved to be ineffective because of the importance of the spill and the late alert by the French authorities. The same day the Walloon authorities have alerted the Flemish and Dutch authorities through the *WASS-procedure* of the River Scheldt Treaty. The Flemish Environment Agency (“VMM”) decides to intervene strongly on 21 April 2020 by adding oxygen to the Scheldt water. The VMM coordinated these actions with *De Vlaamse Waterweg* (the authority competent for the management of the navigable Scheldt), the Agency for Nature and Forest, the Institute for Nature and Forest Research, the local Fire Services and Civil Protection, *Aquafin* and Air Liquide. Actions were taken on the route between *Oudenaarde* and Ghent, including in *Zingem*, at the lock of Asper, in *Gavere* and in *Semmerzake*. By using aerators, purifying polluted water and adding extra water, the pollution was diluted, and massive fish mortality downstream from *Oudenaarde* could be avoided. Volunteers in Wallonia and Flanders have also helped transfer the surviving fish to healthy water nearby. The Pollution has been diverted from Ghent via the *Ringvaart* (diversion canal) to the *Ghent-Terneuzen Canal*¹⁹. Finally, a co-operation on this case has been installed between the French, Walloon and Flemish authorities in the light of Art. 15 ELD and its transposing legislation. It will take time to decide what type of remediable measures are believed to be necessary and to see if the French authorities will be able to impose them on the operator and will be able to recover the costs. Meanwhile, the Walloon and Flemish authorities each have appointed lawyers to represent their interests in possible transboundary criminal and/or civil cases to recover damages. The Flemish authorities have decided to introduce a complaint with an investigation judge in Kortrijk and constitute themselves civil party. It is too early to give any reliable estimation of the damages and the costs of remedial measures. A first estimation of the preventive measures taken in the Flemish Region valued them around € 200.000.

Recent cases of soil pollution are, as indicated above, in the 3 regions dealt with on the basis of their respective soil clean up legislation. The large majority of new such cases consists of relatively small spills of dangerous substances or fuels that can be treated relatively easily within a limited period of time. It is believed that the vast majority of those cases cannot be considered to be ELD cases, because it has not been demonstrated that the land contamination “creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms” and that the measures taken in any event are of a nature to contain and clean up the pollution to avoid that they could become ELD cases.

There might be more cases of damage to protected species and natural habitats, but some of them might just go unnoticed because of damage to species that are not very visible and others cannot be qualified as such because of lack of sufficient baseline-data (Annex I ELD).

One can also say that there is a lot of environmental damage that is not covered by ELD, because it is out of scope (climate change, waste as such...), or it is the result of a very large number of acts or omissions that, taken individually are relative small, but taken together, cause a general deterioration of the environmental quality (e.g. air pollution).

III. Authorities charged with ELD cases

Belgium is, as indicated in the study “*Implementation of the Environmental Liability Directive. Belgium – Country fiche 2019*”, a complex federal state composed of three communities and three regions (the

¹⁹ <https://www.isc-cie.org/agenda-en-nieuws/nieuws/vervuiling-van-en-vissterfte-in-de-schelde/>

Walloon region, the Flemish Region and the Brussels Capital region) and is divided into 10 provinces and 581 municipalities. The ELD is transposed mainly at regional level, because the regions are exercising the vast majority of environmental competencies. However, the federal state has also some competencies in this field, as far as the marine environment is concerned, as well as concerning the placing on the market of GGOs, civil protection and the import, export and transit of protected species.

FEDERAL

At federal level, the Act of 20 January 1999 **on the protection of the marine environment and the marine spatial planning in the sea areas under the jurisdiction of Belgium**, ensures the protection of the marine environment from damage (Articles 37-42). This Act was amended by an Act of 21 April 2007 to incorporate the requirements of the ELD. Executive measures have been laid down in the Royal Decree of 25 October 2007 **on remedial measures concerning significant degradation of the marine environment and recovery of costs for preventive, containment and remedial measures**. The *Directorate-General for the Environment of the Federal Public Service for Health, Food Chain Safety and the Environment* has been assigned as the competent authority for the management of those measures.

Environmental damage caused by genetically modified organisms or products containing them can be subject to measures under the Royal Decree of 3 August 2007 on the **prevention and remedying of environmental damage in connection with the placing on the market of genetically modified organisms or products containing them**. This Royal Decree has been amended by the Royal Decree of 27 April 2016 to further incorporate the requirements of Directive 2004/35/EG. The main competent authority is the *Directorate-General for the Environment of the Federal Public Service for Health, Food Chain Safety and the Environment*, that works in this field in close co-operation with the *Service Biosafety and Biotechnology* (SBB), a unit of *Sciensano* (formerly the Scientific Institute for Public Health, WIV-ISP, Brussels).

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The Royal Decree of 8 November 2007 **on the prevention and remedying of environmental damage as a result of the transport by road, rail, inland waterway or air of exotic plant species as well as exotic animal species and their carcasses** applies to the immediate threat of environmental damage and to environmental damage caused by a professional activity consisting of the transport by road, rail, inland waterway or air of non-native plant species and of non-native animal species and their carcasses, following their import, export and transit. The main competent authority in this case is the *Federal Public Service Mobility and Transport*.

The **Act of 31 December 1963 on civil protection** has been amended by an Act of 27 December 2004 to adapt it to the requirements of the ELD (articles 2bis/1-2bis/3). It contains an obligation for the state and municipalities to recover in principle the costs of the state and the municipalities incurred by their respective services (federal civil protection and local fire brigades) in the exercise of their civil protection tasks in cases of environmental pollution, from the operator who caused the environmental damage or the imminent threat of environmental damage or from the owner of the offending products.

None of those competent authorities have specific dedicated staff for the application of ELD related measures.

An Act of 25 March 2007 has introduced an Article 2277ter in the Civil Code on the prescription of legal claims of public authorities for environmental damages.

REGIONS

All regions have transposed the ELD through different decrees and ordinances, with a similar structure to that of the Directive.

Flanders has mainly transposed the ELD through the Decree of 21 December 2007 supplementing the Decree of 5 April 1995 concerning general provisions to protect the environment with a Title XVI "Supervision, enforcement and safety measures". Those provisions have been executed by the Executive Order of the Flemish Government of 19 July 2013 regulating the information, prevention, containment and remediation obligations regarding environmental damage, the request for measures and the appeal procedure. It is the *Enforcement Unit of the Environmental Department of the Flemish Region* that has been assigned as competent authority. Other authorities will be involved, depending on the nature and size of the case.

The main transposing decree for the *Walloon Region* is the Decree of 22 November 2007 amending Book I of the Environment Code, by adding a Part VII concerning environmental liability with regard to the prevention and remedying of environmental damage, and a Ministerial Circular of 6 March 2008 relating to the implementation of the environmental liability regime. The *Direction de la Politique environnementale* of the *SPW Agriculture, Ressources naturelles et Environnement* is the co-ordinating authority. Other divisions and departments of that SPW will be involved, depending on the nature and size of the case. Urgent measures will be taken by the *Division de la Police de l'environnement (DPE)*.

In the *Brussels Capital Region* the ELD has been transposed through the Ordinance of 8 May 2014 amending the Ordinance of 25 March 1999 (the Code of inspection, prevention, identification and punishment of environmental crimes, and environmental liability). The Director of the Brussels Environmental Administration (*Environnement Bruxelles – Leefmilieu Brussel*) is the competent authority for the application of the ELD legislation in that region.

IV. The scope of responsibility for environmental damages

IV.1 Relevant definitions

As has been highlighted in the study "*Implementation of the Environmental Liability Directive. Belgium – Country fiche 2019*" the transposing legislation closely follows the definitions in the ELD.

It indicates key elements such as the scope of damage to protected species or natural habitats, the definition of operator (only for maritime activities the federal law is more stringent)²⁰. Belgium has adopted both the permit and the state-of-the-art defences and applies joint and several liability in all four jurisdictions. Belgium does not have any legislation establishing mandatory financial security

²⁰ "Exploitant " : een natuurlijke persoon of private of openbare rechtspersoon die een economische activiteit verricht in of met gevolgen voor het mariene milieu in de zeegebieden, ongeacht het al dan niet winstgevend karakter van die activiteit, met uitzondering van de scheepseigenaar ; "exploitant " : une personne physique ou une personne morale privée ou publique qui effectue une activité économique dans le milieu marin ou ayant des conséquences pour le milieu marin dans les espaces marins, que cette activité ait ou non un caractère lucratif, à l'exception du propriétaire de navire. Can be translated as: "operator ": a natural person or a private or public legal person carrying out an economic activity in the marine environment or having consequences for the marine environment, regardless of the profitable nature of this activity, with the exception of the ship owner."

under the ELD. However, the legislation enables the competent authorities to request an operator to provide a financial guarantee against the cost of measures. Financial securities are provided for under other legislation.

As explained above (under II), the soil clean-up legislation provides in the 3 regions lower thresholds for taking remedial measures. The determinant factor is surpassing the relevant standards, called “sanitation standards”, “intervention standards” or “threshold values”, according to the region concerned. It should be noted that all activities that cause soil pollution are subject to those legislations, not only occupational activities listed in Annex III ELD.

IV.2 Responsible persons

Under the ELD transposing legislation the responsible party is the operator. As soil clean up legislation is concerned, the Flemish legislation however makes a distinction between the person who should undertake the soil sanitation and the liable person, in case that is a different one. Regarding the person who should undertake the remediation, a cascade system has been developed. It is in the first place the operator undertaking an activity subject to an environmental permit or notification on the piece of land where the pollution originated, that has the duty. In case there is no such operator, or he has a valid excuse, it will be the user of that piece of land that has the remediation duty. If there is no user or he has a valid excuse, it will be the owner of that piece of land that has the duty. In case those persons are not the polluter, they can reclaim the sanitation cost of the polluter who is strictly liable in that regard. In the Walloon region, in the event of a serious indication of pollution, the Administration designates a duty holder following another cascade: the (presumed) polluter, operator, owner.²¹ In the Brussels Capital Region it is the current operator that caused this contamination, the holder of the rights in rem that has caused the pollution or the identified person who caused the pollution, who has the duty to remediate the soil pollution. In case several of those persons have caused the pollution, these are jointly responsible for the clean-up.

IV.3 Form of liability

As indicated in the study *“Implementation of the Environmental Liability Directive. Belgium – Country fiche 2019”* the transposing legislation closely follows the wording and the approach of the ELD. So there is strict liability for Annex III occupational activities and fault based liability for damage to protected species and natural habitat, as other activities are concerned. It applies joint and several liability in all four jurisdictions.

As soil pollution is concerned, there are strict liability regimes in the 3 regions. In Flanders, in case the person who has had to do the remediation is not the polluter, he can the reclaim of his expenses from the person who caused the soil pollution. The polluter is indeed strictly liable for those remediation costs. A causal link should be proven by the person who is reclaiming his remediation costs. As indicated above (IV.2), the situation is different in the two other regions. In the Walloon region the

²¹ <https://sol.environnement.wallonie.be/home/sols/presentation-generale-du-decret-sols-2018/les-faits-generateurs-dobligations.html>

(presumed) polluter will be in the first place the person who has to do the clean-up, followed by the operator and the owner, in case these are not the same persons. It is a strict liability. The Brussels Capital Region regime also has a strict liability approach (see IV.2)

IV.4 Defences

As indicated in the study *“Implementation of the Environmental Liability Directive. Belgium – Country fiche 2019”*, Belgium has adopted in its ELD transposition legislation both the permit and the state-of-the-art defences.

However, those defences do not apply under two of the three regional soil clean-up legislations. The regional soil clean-up legislations provide some exceptions regarding the duty to remediate. In the Flemish region, the operator or the user of the piece of land where the soil pollution originated is not obliged to remediate in case he can prove he has not caused the soil pollution and the soil pollution has occurred before he got the land in operation or use. In addition, the owner has to prove that he was not aware and should not have been aware of the soil pollution at the time he became owner of the land. The strict liability of the polluter is however without exceptions. In the Walloon Region, no author or alleged author can be assigned when: he cannot be identified or is difficult to identify; he cannot be held responsible for the pollution; the distribution of the responsibility between all the authors is difficult to establish according to the conditions fixed by the Government. He also cannot be designated when he is insolvent, unless the insolvency results from fraud. In the absence of an author or alleged author, the administration designates, as the holder of the obligations, the operator provided that he is not insolvent, unless the insolvency results from fraud. In the absence of other holders, the administration designates, as holder of the obligations, the usufructuary, the long-term leaseholder, the superficiary or the lessee who enjoys effective control of the land. When the right on the land is not subject to any dismemberment, the administration designates the owner of the land concerned.

In the Brussels Capital Region, whoever has generated soil pollution is responsible for the costs incurred for carrying out a survey of the condition of the soil and for the treatment of this pollution by the holder(s) of these obligations, or by the regional fund for treatment of orphan soil pollution, as well as for the damage caused by these studies, treatments and other measures. The operator of an installation subject to an environmental permit or to a declaration is responsible for those costs, if the soil pollution was generated by the operation of this facility. The operator is not, however, held responsible for these costs if he proves that he has not committed any fault or negligence and that the soil pollution is due to an emission or an event expressly authorized and respecting all the conditions linked to a permit or a declaration which is applicable at the time of the issue or the event, issued or renewed by virtue of the ordinance of June 5, 1997 relating to environmental permits. When several people are responsible for the same soil pollution, they are jointly responsible.

V. The ELD procedure

V.1 Onset of the ELD procedure

According to the ELD legislation in the different regions and on the federal level, it is the duty of the operator of occupational activities when environmental damage has not yet occurred, but there is an imminent threat of such damage occurring, to take, without delay, the necessary preventive measures and to inform the competent authority of all relevant aspects of the situation, as soon as possible.

Other sources of information are monitoring by the various environmental administrations and inspectorates, complaints by citizens and NGOs. In the Walloon Region one has the well-known *SOS Environnement-Nature* hotline²². In the Brussels Capital Region one can contact the Environmental Police through the 112 hotline and the Environmental Agency²³. In Flanders one can contact the environmental inspectorate²⁴. In urgent situations one has always the possibility to contact the 112-hotline, that can alert all the necessary services (ambulance, fire brigade, police...) included in the disaster planning.

The competent authorities can also be alerted by media. In case of the River Scheldt pollution in April 2020 e.g. the competent authorities in Flanders have been alerted by a press release of the *Office français de la biodiversité*, that was found by an officer of the Nature and Forest Agency on the internet, after he had heard some rumours about an important water pollution case in the North of France²⁵.

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V.2 Measures to prevent or clean up/remedy environmental damage

a. Who is taking the measures

As follows from the cases discussed under II, we can only report 2 cases in which formally remedial measures haven been taken under the ELD implementation legislation. In the *Wetteren cargo train* case the soil remediation has been undertaken by *Infrabel*, the public railway infrastructure company, and that company is reclaiming the costs from the private train operator that caused the incident. In the *River Sûre* case, the primary remedial measures haven been taken by the operator, while the complementary and compensatory remedial measures have been or are been taken by the public authority and third party contractors.

As has been explained above (IV.2), in cases of soil pollution, the remediation is done by the responsible persons, according to the relevant regional legislations, under supervision of the authorities, on the basis of approved sanitation projects. In the various regional legislations it has been determined when basic and advanced soil assessment studies must be carried out by operators or land

²² https://ofb.gouv.fr/actualites/pollution-suite-la-rupture-de-digue-dun-bassin-de-decantation-loffice-francais-de-la?fbclid=IwAR1Jo9tjTN04ScDcvtQymaXA768zcSuxRzbMOKYuk_Vq73zVAqP0QKqzEJIhttp://environnement.wallonie.be/frameset.cfm?page=http://environnement.wallonie.be/sos.htm

²³ <https://leefmilieu.brussels/leefmilieu-brussel/contacteer-ons>

²⁴ <https://omgeving.vlaanderen.be/inspectie-milieu-onroerend-erfgoed-ruimtelijke-ordering-waarvoor-kan-u-bij-ons-terecht#milieu>

²⁵ https://ofb.gouv.fr/actualites/pollution-suite-la-rupture-de-digue-dun-bassin-de-decantation-loffice-francais-de-la?fbclid=IwAR1Jo9tjTN04ScDcvtQymaXA768zcSuxRzbMOKYuk_Vq73zVAqP0QKqzEJI

owners. Those studies, conducted by certified soil sanitation experts, have to be communicated to the soil authorities. If the relevant standards are exceeded, a soil sanitation project shall be drafted and executed after approval, containing the remediation measures to be taken. The authority has also always the possibility to investigate ex officio cases of potential soil pollution and trigger the soil sanitation procedures. The regional authorities provide for guidelines on how to conduct those studies and draft those projects in according with best practice standards²⁶.

As older polluted sites are concerned, thus not falling within the scope of the ELD, these are subject to the different regional soil clean up legislations²⁷.

In the *Flemish region* the OVAM is spending yearly around € 35 million for soil sanitations for which no duty holder²⁸ can be found. Around 100 of such cases are started up every year. In 2019, 802 of such cases were running²⁹. The land information register operated by OVAM now contains information on nearly 290.000 pieces of land. Around 97.400 pieces of land are registered in the local registers of land where there is a risk of soil pollution due to past activities, which still need to be investigated. Every year between 2.300 and 3.400 exploratory soil investigations are performed, resulting in around 250 new soil sanitations every year. According to the planning all those pieces of land should be investigated at the latest in 2028 and in 2036 all historically polluted sites should be cleaned up or the cleaning up should have been started. For some sectors some collective sanitation funds have been set up. That is the case for petrol stations: the BOFAS fund, created in 2004, has cleaned up nearly all sites that have been closed down since. The VLABOTEX fund is taking care of the dry-cleaning sector. A PREMAZ fund to clean up gas oil tanks for heating purposes is nearly operational. TERSANA has been created to support the garage, bodywork and agricultural machinery sector.

In the Walloon region the *Banque de Données de l'Etat des Sols (BDES)* (Soil State Database) offers all citizens access to the data available to the Administration on the state of the soil in Wallonia. It also makes it possible to issue conformity extracts during certain administrative procedures. The Soil State Database identifies, for each cadastral plot, the available data related to a possible state of soil pollution, past or present, as well as plots where an activity is carried out posing a risk for the soil. These data are provided by various public bodies called "Reference Sources" which have them available in the context of their activities. Thanks to its cartographic interface, the BDES makes it possible to instantly provide essential information making it possible to anticipate any administrative procedures related to the plot, in particular within the framework of a real estate transfer or permit application. The plots concerned are distinguished by two colors, namely: Lavender blue and Peach. A Lavender blue Plot is concerned by information of a strictly indicative nature that does not lead to any specific legal obligation. A Peach Plot is a Plot for which soil management procedures have been carried out or are to be planned³⁰. As the Region is confronted with an important legacy of historic polluted soils in the former industrial regions, there is a particular role attributed to the *SPAQUE*, a company owned by the region, in the management and conversion of degraded land. To date, 59 sites have been

²⁶ <https://www.ovam.be/richtlijnen-bodemsaneringsdeskundigen>;
<https://sol.environnement.wallonie.be/home/sols/sols-pollues/code-wallon-de-bonnes-pratiques--cwbp-.html>;
<https://leefmilieu.brussels/themas/bodem/specifieke-informatie-voor-professionelen/codes-van-goede-praktijk>

²⁷ <https://www.ovam.be/bodem>; <https://sol.environnement.wallonie.be/home/sols.html>;
<https://leefmilieu.brussels/themas/bodem>

²⁸ The duty to do the soil sanitation.

²⁹ An overview of the largest cases can be found in: OVAM, *Verslag over de uitvoering van het Bodemdecreet voor het jaar 2019*, p. 22-24.

³⁰ <https://sol.environnement.wallonie.be/bdes.html>

rehabilitated: 23 sites (or 599 hectares) have been reconverted and 26 (or 387 hectares) are undergoing a conversion project³¹.

In the Brussels Capital Region, the Environmental Administration (*Environnement Bruxelles/ Leefmilieu Brussel*) has in 2002 on its own initiative and outside any legal framework, compiled the first inventory of contaminated and potentially contaminated sites. In 2004, the Soil Ordinance confirmed this inventory and gave the Brussels Environmental Administration the task of drawing up and maintaining an inventory of contaminated soils or soils for which there were strong indications of contamination. The content and structure of the existing inventory has been modified later on by adding, among other things, the references of the cadastral parcels and their owners, as well as the risk activities that take place or have taken place in the inventoried sites, in order to conform them to the Ordinance. In 2009, the new "Soil Ordinance" again required to adapt the structure of the existing inventory and to include additional information. Among other things, the known accidents on the inventoried sites and their causes, as well as the categories of the soil condition. The pieces of land are categorized in 5 categories. The validated map can be consulted online³².

As has been indicated in the study "*Implementation of the Environmental Liability Directive. Belgium – Country fiche 2019*" each region has, apart from the measures provided by the ELD implementation legislation, the option to issue certain administrative orders: order the suspected violator/polluter to cease activities; order the suspected violator/polluter to take specific actions to end the infringement, reverse the damage which has been caused and prevent any future recurrence of the activity in question; order a coercive measure.

Both the Flemish region and the Walloon region provide for the possibility to apply safety or coercive measures. The Flemish region defines safety measures as any necessary action taken under the current circumstances to eliminate, reduce to an acceptable level or stabilise a significant risk to mankind or the environment.

Safety measures include the following: the cessation or execution of operations, actions or activities, immediately or within a certain period; the prohibition on the use or sealing of buildings, installations, machines, equipment, means of transport, containers, grounds and everything contained therein or on them; the total or partial closure of an installation; the taking, storage or removal of items susceptible to this, including waste materials and animals; the non-entry or departure from certain areas, grounds, buildings or roads. The safety measure will be in place for as long as the risk in question has not been eliminated, reduced to an acceptable level or stabilised. In certain situations, a criminal judge can also impose the safety measure to prohibit the operation of the installations, which are at the origin of the environmental offence, for a period of time determined by the judge. The Walloon legislation provides for similar measures coercive measures. In certain circumstances, the mayor can take the following coercive measures: the total or partial cessation of an exploitation or an activity; sealing the equipment and, if necessary, close down the installation immediately and temporarily; impose an intervention plan on the person responsible for the aforementioned installation, operation or activity or oblige him to submit a recovery or remediation plan within a certain period of time and, if necessary, oblige him to provide a guarantee in favour of the Region; take any other useful measure to put an end to a threat to the environment, including human health; provide information to the administration within the meaning of the Decree of 1 March 2018 on soil management and soil

³¹ <https://spaque.be/>

³² <https://geodata.leefmilieu.brussels/client/view/01445cff-7034-463e-853c-e918232a8a5e>

remediation; in case the infringement concerns live animals, then the administrative seizure of the animals may be ordered.

Those measures can be considered in some cases as measures to prevent that a given situation deteriorates and becomes a case of environmental damage of the type the ELD is about. A lot of such measures are taken yearly. In 2018 in the Flemish Region it has been reported that 673 such measures have been taken, mainly by the Nature and Forest Agency, local environmental authorities and police.³³ In the Walloon Region the number of such measures has been estimated at around 500 each year. Sometimes the content of such measures has been inspired by Annex II of the ELD.

b. What were the measures?

In the two formal ELD cases, the *Wetteren* cargo train incident and the River *Sûre* case, the measures are directed at full prevention and remediation.

In soil clean up cases, the various regional legislations determine the objectives of the remediation measures. In the Flemish Region, the objective of a soil remediation project is to realise the guiding values for soil quality, which have been set by the Flemish Government³⁴. These values correspond to a concentration of pollutants or organisms in or on the soil, which permits the soil to perform all its functions without any restriction being imposed. In case those values cannot be reached by applying soil remediation techniques according to BATNEEC, the soil remediation should at least result in a better soil quality than before. In case there is a residual risk, restrictions concerning the use of the land can be imposed. In the Walloon Region, depending on the results of the characterization study, remediation of the plot may be required. The aim is to restore the soil or, at the very least, to remove the serious threat to human health, groundwater and, where applicable, ecosystems. The level of remediation will depend on the future use of the plot³⁵. In the Brussels Capital Region the objective of a soil remediation is to reach the remediation standards established by the Brussels Capital Government³⁶. Remediation standards are concentrations of pollutants in the soil and groundwater below which the risks to public health and the environment are considered nil and the soil can fulfil all of its functions.

The other type of administrative measures discussed under (a) can, as the case might be, just stop or preventing the pollution/damage, or have a more remedial nature. There is a large discretion for the authorities in applying those measures.

c. Types of remediation

In the River *Sûre* case, not only primary remediation measures have been imposed, but also complementary and compensatory measures. Those complementary and compensatory measures

³³ VHRM, Milieuhandhavingsrapport 2018, 81-82;

http://www.vhrm.be/sites/default/files/MHR2018_DE_LR.pdf

³⁴ <https://navigator.emis.vito.be/mijn-navigator?wold=23676&woLang=nl>

³⁵ Art. 56 Decree of 1 March 2010 on soil management and remediation;

<http://environnement.wallonie.be/legis/solsoussol/sol006.htm>

³⁶ https://leefmilieu.brussels/sites/default/files/legi_20180329_arrete_normes_1.pdf

have to be taken over a longer period and are expected to be fully completed between 2024 and 2029. It was possible to define those measures because an intensive scientific monitoring in the *Sûre* Valley is conducted since 2002. Those measures have been designed by a competent officer of the Walloon region with a scientific background in ecology and after consultation of foreign scientists.

In the *Wetteren* cargo train incident the procedures provided for in the Flemish soil clean up legislation have been applied. The first stage in the remediation process is the descriptive soil examination. A descriptive soil examination is carried out by a certified soil sanitation expert³⁷ to establish the severity of the soil pollution. The purpose of this is to describe the nature, quantity, concentration and origin of the polluting substances or organisms, the possibility of dispersion of these substances or organisms and the hazard of exposure to them for humans, plants, animals, groundwater and surface water, as well as a prognosis of the spontaneous evolution of the contaminated soil. The second stage in the soil remediation process is the soil remediation project. A soil remediation project, drafted by a certified soil sanitation expert, proposes the way in which the soil remediation is to be carried out. One has to systematically investigate the different sanitation approaches and techniques that are possible, applying the standard procedure set by OVAM³⁸, and propose the best option using BATNEEC. It includes an EIA screening, and as the case might be, an EIA. The project is subject to a public inquiry allowing for public participation. After that OVAM will approve (or not) the soil remediation project that has to be executed by a certified soil remediation enterprise. The remediation project will end with a final evaluation by a certified soil sanitation expert and a declaration of OVAM on the results of the remediation project. Similar rules apply in the other regions about the way soil remediation measures are proposed and approved³⁹.

The ELD transposition legislation for the other forms of environmental damage (water or biodiversity damage) also provides for a procedure to decide about the remedial measures. In the Flemish Region⁴⁰ e.g. operators shall identify potential remedial actions and submit them to the competent authority for approval. When defining primary restoration measures, options are considered to restore natural resources or ecosystem functions directly and in an accelerated way, or through natural generation. In determining the scope of complementary and compensatory restoration measures, an approach based on the equivalence of resources or functions is first considered. In such an approach, first measures are considered that lead to natural resources or ecosystem functions of the same type, quality and quantity as those that have been affected. If this is not possible, alternative natural resources or ecosystem functions will be provided. Where the approach based on the equivalence of natural resources or functions proves impossible, alternative valuation techniques shall be used. If a valuation of the lost resources or functions is possible, but a valuation of the replacement of the natural resources or functions is not feasible within a reasonable time and at a reasonable cost, the competent authority may opt for remedial action, the cost of which corresponds to the estimated monetary value, the value of the lost natural resources or ecosystem functions. Reasonable recovery options are assessed, using the best available techniques, based on the following criteria: 1 ° the effect of each option on human health and safety; 2 ° the costs of implementing the various options; 3 ° the chance of success of each option; 4 ° the extent to which each option will prevent future damage and to which

³⁷ <https://www.ovam.be/LijstBsd>

³⁸

https://ovam.be/sites/default/files/atoms/files/Standaardprocedure_Bodemsaneringsproject_versie%20jan%202017.pdf

³⁹ <https://leefmilieu.brussels/themas/bodem/de-bodemonderzoeken/wie-mag-een-bodemonderzoek-uitvoeren>; <https://sol.environnement.wallonie.be/home/sols/presentation-generale-du-decret-sols-2018/les-obligations-du-decret-sols.html>

⁴⁰ Artt. 15.3.3 and 15.3.10 Decree of 5 April 1995 (Amended)

unintended damage can be avoided during the execution of the option; 5 ° the extent to which each option benefits the different components of the relevant natural resources or ecosystem functions in question; 6 ° the extent to which each option takes into account relevant social, economic and cultural points of interest and other relevant location-related factors; 7 ° the time it will take to effectively repair the environmental damage; 8 ° the extent to which each option achieves the restoration of the location of the environmental damage; 9 ° the geographic relationship with the location where the damage occurred. When evaluating the different restoration options, primary restoration measures may be chosen that do not fully restore degraded water and protected species and natural habitats to their baseline status or that are less likely to restore that baseline condition. Such a decision should only be taken when the natural resources or ecosystem functions that are the object of this decision are compensated by strengthening the complementary and compensatory measures, thus creating a similar level of natural resources or ecosystem functions as originally existed. The competent authority may decide that no further remedial action is taken if: 1 ° the remedial measures already taken guarantee that there is no longer any significant risk of negative effects on human health, water or protected species and natural habitats; 2 ° the costs of the remedial measures to be taken to achieve the baseline condition or an equivalent level would be disproportionate to the environmental benefits that would be obtained. Restoring damage to water, protected species and natural habitats also means removing any significant risk of negative impacts on human health. Similar provisions, directly inspired by the ELD, apply in the other Regions⁴¹.

V.3 Other procedural aspects

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The ELD transposition legislation in the various regions provides for the possibility to request measures by third parties (see below IX.2) and for administrative appeals. In the Flemish region e.g. third parties requesting measures can appeal against the decision of the competent authority to take or not to take those measures with the Flemish Government. The operators with regard to which the competent authority took preventive actions or remedial actions, may also appeal to the Flemish Government against the decisions concerning these actions. The appeal should be introduced with the Flemish Government within thirty days of the day of receipt of the contested decision (in the Walloon Region this should be done within 10 working days). The Flemish Government will make a decision on admissibility within a period of fourteen days after receipt of the appeal (in the Walloon Region within 10 working days). Within a period of ninety days after the declaration of admissibility of the appeal, the Flemish Government takes a decision on the appeal. This appeal is non-suspensive. If the decision on the submitted appeal is not made within a period of ninety days, the appeal is deemed to have been rejected. The decision of the Flemish Government can be appealed before the supreme Administrative Court (Council of State) within 60 days. In the Brussels Capital Region there are two instances of administrative appeal. An appeal can be introduced with the Environmental College, a specialised environmental appeal body, and if not satisfied, further on with the Government of the Brussels Capital Region. A final decision can then be appealed with the Supreme Administrative Court.

Similar possibilities to appeal are provided for in the regional soil clean up legislations.

⁴¹ Artt. D.105-D.111 Walloon Environmental Code; Art. 25 and Annex 2 of the Brussels Code of inspection, prevention, identification and punishment of environmental crimes, and environmental liability.

VI. Follow up procedures to ensure that the damage is prevented or cleaned up (cleaned up/restored) or paid for

Under the ELD legislation in Flanders, the Region can recover its costs from the operator by writ of execution (that can be contested by the operator in court). To secure the recovery of costs the region has a general privilege over all movable property of the operator and can register a legal mortgage. There are no specific provisions about monitoring the execution of the remedial measures, but the general provisions on inspection and enforcement apply. As has been indicated, the soil clean-up legislation provides for strict monitoring during the process, an end-evaluation by a certified soil remediation expert and for an “end declaration” by OVAM. The general inspection and enforcement provisions are applicable. The legislation and practice in the Walloon and Brussels Capital region are similar.

VII. Time dimensions of the ELD cases

As the formally in Belgium as ELD identified cases show, ELD cases are time consuming. The soil remediation in the *Wetteren cargo train* case has been finalised in 2 years’ time, but 5 years after the incident the recovery of the costs is still pending. In the *Sûre* case, as the measures run until 2029, they are expected to have been fully completed 15 years after the incident. In general, full soil sanitation projects, will take at least 5 years to be finalised, but often much longer (an average of 8 years has been put forward), the exception being the small and urgent cases of soil pollution that are handled through the accelerated remediation procedure and are completed in 6 months as a rule. As cost recovery is concerned, the specific statute of limitation, seems not be problematic, because it is 5 years from the moment the remediation measures have completely been executed or the operator has been identified, and in any case within 30 years of the facts causing the damage. It is sufficient to introduce the claim within that term.

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VIII. Costs (at the responsible parties and at other role players, within and outside the administrative and/or court procedures)

In the *Sûre* case, the insurance of the operator has borne the costs. In the *Wetteren* case the soil remediation has been pre-financed by the Public Railway Infrastructure Company Infrabel, but one is optimistic that finally the insurance of the private operator of the train will bear those costs. In general, as soil remediation is concerned, in new cases the operators and their insurances are in general paying for the remediation costs. However, that will not include the costs incurred by the authorities for administering the legislation. The picture seems to be different for cases of historic soil pollution, where from time to time it is very difficult to have the liable person – if there is still such a person – pay for the remediation. In such cases finally the tax payer will take up the bill (see V.2 a), unless a project developer can make a business case by redeveloping polluted land while taking care of the soil remediation. It seems that this is a growing tendency, given the increasing shortages in land that can be developed.

IX. Public participation

IX.1 Access to information

There are no provisions that call for active dissemination of information on environmental damage incidents and there are no governmental websites, public databases or other communication tools centralising this information. The information on ELD matters on the official websites is of a general nature, explaining the highlights of the legislation. The rules on passive access to information apply. Most of the time media report on such cases⁴².

IX.2 Access to participation and justice (second and third pillars in the Aarhus system)

The ELD transposition legislation provides that natural or legal persons affected or likely to be affected by environmental damage or having an interest in the environmental decision making relating to the damage, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action⁴³. ENGO's that meet the criteria referred to in the regional legislation, being those of the Federal Act of 12 January 1993⁴⁴ or set forth by that regional legislation itself⁴⁵, are also entitled to do this. The competent authority has 30 days to take a decision (in complex cases in the Walloon Region the decision must be taken within 60 days). The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances, the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations. The competent authority that has to decide on the preventive and remedial measures invites the persons having submitted observations or having requested measures and in any event the persons on whose site the remedial measures and containment measures are taken, and the operator concerned to

⁴² <https://omgeving.vlaanderen.be/milieuschade>; <https://www.wallonie.be/fr/demarches/demander-laction-des-autorites-publiques-en-cas-de-dommage-environnemental>

⁴³ <https://www.wallonie.be/fr/demarches/demander-laction-des-autorites-publiques-en-cas-de-dommage-environnemental>;

⁴⁴ In the Flemish Region: an ENGO's must be a legal person with the aim of protecting the environment, that has defined in its statutes the territory to which his activities extend and who fulfils the conditions provided for in article 17, second paragraph, 1 ° to 4 °, of the Judicial Code, meaning that they should specify the environmental objectives of the association in its statutes and is active in achieving them.

⁴⁵ According to the Walloon legislation environmental protection associations, can act, provided they have legal personality and have included environmental protection in their corporate purpose; these associations must provide proof, by producing their activity report or any other document, that they have a real activity in accordance with their statutory purpose. According to the Brussels Capital legislation, the association must be established as a non-profit organization, the association already existed before the date on which the environmental damage or the imminent threat of damage occurred; the statutory objective of the organisation is to protect the environment and the request is in line with the statutory purpose of the association, as appears on the date on which the damage or the imminent threat of damage occurs or has occurred. See also: EFTEC, *Environmental Liability Directive: Training Handbook and Accompanying Slides*, June 2019, p. 13.

submit comments. The competent authority shall take those comments into account. The competent authority shall consider comments and requests for action that demonstrate environmental damage. The competent authority shall notify the aforementioned persons as soon as possible of the decision whether or not to take measures, and the reasons for this. Given the low number of formal ELD cases, experience with that legislation is lacking.

One has to notice that in the regional soil clean up legislations opportunities for public participation are provided for. In the Flemish Region a soil remediation project is subject to a public inquiry and EIA screening or full EIA, very similar to what is happening in an environmental permitting procedure. During 30 days, there will be a public inquiry in the concerned municipalities and expert opinions of competent agencies will be asked. Every person can introduce its suggestions and remarks. The decision taken afterwards by the OVAM on the remediation project equals to a permit decision to conduct the remediation activities. The legislation in the Walloon and the Brussels Capital Region are quite similar.

It is also important to note that in the Flemish Region, a similar request to take administrative measures as that provide for in the ELD legislation, has been provided for in the general legislation concerning breaches of environmental law than can be activated in any case of breaches of environmental law⁴⁶. In 2018 22 such measures haven been imposed⁴⁷. Every year there are between 5 and 20 appeals against decisions not to impose such measures, for the period 2012-2018, a total of 83, with a success rate of 28 %⁴⁸. A similar possibility will become available in the Walloon Region in the near future due to recent legislative amendments.

IX.3 Capacity to participate

The general impression is that citizen and ENGO participation in the various procedures provided for in the ELD legislation, the soil clean up legislation, and the more general environmental enforcement legislation, is relatively low. Exception can be made for cases where there is a direct impact on the property of individual citizens or on natural reserves that are under management of nature organisations. There are no governmental subsidies specifically to support the work of ENGOs in this field and the general subsidies tend to become more limited because of budgetary restrictions. Nor is there an active governmental policy to increase the level of participation of the public at large in this field.

⁴⁶ Art. 16.4.18 Decree of 5 April 1995.

⁴⁷ VHRM, *Milieuhandhavingsrapport 2018*, p. 82-84;
http://www.vhrm.be/sites/default/files/MHR2018_DE_LR.pdf

⁴⁸ *Ibid*, p. 86.

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